Retail Clerks Union Local 1442 Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC (Federated Department Stores, d/b/a Ralphs Grocery Company, Albertson's Inc., Alpha Beta Company, Arden-Mayfair, Inc., The Boys Market, Inc., Foods Co. Markets, Inc., Hughes Markets, Inc., Jurgensen's Grocery Company, The Kroger Company d/b/a Market Basket, Lucky Stores, Inc., Safeway Stores, Incorporated, Smith's Management Corporation, d/b/a Smith's Food King, Thriftimart Incorporated and Vons Grocery Company) *and* Food Employers Council, Inc. and Retail Clerks Union Local 137, 324, 905, 1222 and 1428 Chartered by United Food and Commerical Workers International Union, AFL-CIO-CLC, Parties to the Contract. Case 31-CE-129

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 27 February 1981 Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent, the Intervenors, and the Charging Party[1] filed exceptions and supporting briefs, the Intervenors filed a brief in answer to the Charging Party's exceptions, and the Charging Party filed a brief in answer to the Respondent's and the Intervenors' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided, for the following reasons, to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

The Board is here asked to determine whether a provision in a collective-bargaining agreement between the Respondent and the Charging Party (the Employer), known as article I.A.3., is, as alleged in the complaint, on its face an unlawful "union signatory clause, rather than a lawful, union standards or work preservation clause." The judge found the provision to be unlawful on its face and violative of Section 8(e) of the Act. We agree.

Section 8(e) makes it unlawful for an employer and a union to enter into any contract or agreement, express or implied, whereby the employer agrees to cease or refrain or ceases or refrains from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer or to cease doing business with any other person. It states that any contract "entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void."

Although Section 8(e) can literally be read as forbidding all agreements which prevent an employer from establishing a business relationship with another employer, or which causes it to terminate an already existing relationship, it has not been so construed. Thus, the Board has held that a contract clause which limits subcontracting so as to preserve for bargaining unit employees work that has traditionally been performed by them, the so-called work-preservation clause, or one which limits subcontracting to employers who maintain the same standards of employment, the so-called union standards clause, does not violate the Act.[3] The underlying rationale for the lawful character of these clauses is that the union has a primary interest in preserving unit work for unit employees and to ensure that negotiated standards will not be undermined.[4] However, if a subcontacting clause runs to noneconomic items which have the effect of requiring a subcontractor to adhere to working conditions unrelated to economic benefits, then the clause is viewed as being secondary in nature and within the proscription of Section 8(e).[5] Thus, a contract clause which purports to limit subcontracting to employers who are signatories to the union contract, the so-called union signatory clause, violates the Act since such a clause is not designed to protect the wages and job opportunities of unit employees covered by the contract, but rather is directed at furthering general union objectives and regulating the labor policies of other employers.[6] In our view, article I.A.3. falls within this latter category.

The language of article I.A.3. reads as follows:

[1] The Charging Party's request for attorney's fees and litigation expenses is hereby denied as we do not find the Respondent's or the Intervenors' defenses to be patently frivolous. See *Amsterdam Printing & Litho Corp.*, 223 NLRB 370, 372 (1976), and *Heck's Inc.*, 215 NLRB 765 (1974).

[2] In his decision, the judge found that the Intervenors, as well as the Respondent, had violated Sec. 8(e) of the Act and directed the Intervenors to comply with the terms of his recommended Order. We disagree with this finding. Although the Intervenors appeared and participated at the hearing, they were neither charged with having violated any provision of the Act nor named as respondents in the complaint. Furthermore, as they were not named as respondents, the Intervenors did not file a responsive pleading in these proceedings. Under these circumstances it would be improper to find that the Intervenors had violated the Act or to require that they comply with the terms of the judge's recommended Order.

[3] *Teamsters Local 94 (California Dump Trucks Owners Assn.)*, 227 NLRB 269, 272 (1976).

[4] Id.

[5] *Tri-State Building Trades Council (Stark Electric)*, 262 NLRB 672, 674 (1982).

[6] *Teamsters Local 94*, supra at 272.

> The Employer agrees that any employees performing bargaining unit work set forth in this Agreement, within its establishments, including employees of lessees, licensees, and concessionaires shall be members of a single, overall unit, and the Employer will at all times exercise and retain full control of the terms and conditions of employment within its establishments of all such employees pursuant to this Agreement and shall not enter into or maintain and enforce any lease or other agreement inconsistent with the provisions hereof. The Employer's obligation with respect to operators of leased departments is limited to that set forth above, provided that the Employer shall furnish to the Union written evidence that the operator of the leased department has assumed such obligation. Provided the Employer fulfills his obligation as set forth above, the Employer shall not be liable for any breach of contract or failure of a leased department to abide by the wages, hours and working conditions set forth in this Agreement. The seniority of employees of leased departments shall be separate from the seniority of employees of the Employer and of employees of other leased departments.

From the above language it is apparent that article I.A.3. is designed to do more than merely preserve bargaining unit work for unit employees or prevent the erosion of union standards. Rather, it is clear that the clause has an unlawful secondary objective for, by its very terms, it requires that any lessee, licensee, or concessionaire wishing to do business with the Employer assume *all* (with the possible exception of the seniority provision) the obligations of the contract between the Employer and the Respondent, including such noneconomic terms of the contract as the union-security clause. Further, the secondary thrust of article I.A.3. is identical to that involved in the typical "union signatory" clause. While there is no requirement in article I.A.3. that such lessees, licensees, and concessionaires execute the Respondent's contract as a precondition for doing business with the Employer, the Employer is nevertheless prohibited from doing business with any such subcontractor unless some written evidence is submitted to the Union by the Employer indicating that the subcontractor has agreed to abide by the terms of the contract. The clause does not define what would constitute sufficient "written evidence" to satisfy the Employer's obligation to the Respondent. However, it is not unreasonable to assume that anything less than a signed and legally binding statement from a subcontractor to the Employer agreeing to adhere to all the terms of the contract would be insufficient to meet that obligation. Thus, the "written evidence" requirement of article I.A.3. is clearly designed to achieve the same result that would be obtained through the typical "union signatory" clause, i.e., preventing a subcontractor from doing business with the Employer unless it first agrees to adhere to all the terms of the contract between the Respondent and the Employer.[7]

In light of the above, we conclude that article I.A.3. is not designed to protect or preserve the jobs and working conditions of unit employees, but rather is designed to control the employment practices of other employers who would do business with the Employer, and to aid union members generally.[8] Accordingly, we find that article I.A.3. is, on its face, an unlawful union signatory clause and hence violates Section 8(e) of the Act, as alleged.[9]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Re-

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[7] While the "written evidence" language of art. I.A.3. is, as indicated, obviously designed to achieve the same result that would be obtained through the signing of the contract, i.e., adherence to all its terms, the absence of such language would not necessarily preclude a finding that the clause is unlawful on its face. Rather, the key consideration, as noted by the Board in *Retail Clerks Local 1428 (Jones & Jones)*, 155 NLRB 656 (1965), is whether a subcontractor is required, as a condition of doing business with an employer, to "recognize and become bound to the observance of that agreement." If so, "the secondary thrust [of that clause] is identical to that involved in the typical 'union signatory clause.'" Id. at 660.

[8] We note that this clause has been previously found to be unlawful on its face. See *Retail Clerks Local 324 (Ralph's Grocery Co.)*, 235 NLRB 711 (1978).

[9] Contrary to the Respondent's claim, the Supreme Court's decisions in *NLRB v. International Longshoremen's Assn.*, 447 U.S. 490 (1980), and *NLRB v. Plumbers Local 638 (Enterprise Assn. of Pipefitters)*, 429 U.S. 507 (1977), neither overruled *Ralph's Grocery Co.*, supra, nor are controlling here. Rather, in the *ILA* case, the Supreme Court held only that the Board, in finding that the union's containerization rules violated Sec. 8(e) of the Act, had erroneously applied its work-preservation doctrine by not properly defining the work in dispute. It therefore remanded the case to the Board to determine whether, under a proper construction of the work-preservation doctrine, the *ILA*'s rules can be viewed as having a lawful objective. We find nothing in that decision to suggest that the Board is prohibited from determining whether a clause facially violates Sec. 8(e) of the Act. Indeed, responding to the dissenting opinion in that decision, the Supreme Court majority in fn. 26 clearly stated that its holding in the case was limited solely to its finding that the Board had, as a matter of law, erred in defining the work in controversy and that the question of whether the rules were sustainable under a proper construction of the work-preservation doctrine was for the Board, in the first instance, to decide. Consequently, the issue of whether a provision in a collective-bargaining agreement can be found to be facially invalid under Sec. 8(e) was neither presented to nor decided by the Supreme Court in its ILA decision.

Nor was it before the Court in the *Enterprise Assn. of Pipefitters* case. In fact, as indicated in fn. 8 of that decision, the validity of the "will not handle" provision in the parties' agreement was not contested. Rather, what was contested there was the means by which the respondent union chose to enforce its valid agreement. Thus, as in the *ILA* case, the issue of whether a clause can be found to be facially invalid under Sec. 8(e) was not before the Court. For these reasons, we find the Respondent's reliance on these cases to be misplaced.

spondent, Retail Clerks Union Local 1442 Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC, Santa Monica, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Delete from paragraphs 2(a) and (c) the words "and each Intervenor."

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. This matter was tried before me on October 31, 1980 at Los Angeles, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 31 of the National Labor Relations Board on April 26, 1979, alleging that Retail Clerks Union Local 1442, chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC (herein Respondent)[1] violated Section 8(e) of the National Labor Relations Act (herein the Act). The complaint is based on charges filed by Food Employers Council, Inc. (herein the Charging Party) on February 16, 1979.[2]

The complaint alleges that Respondent has entered into a collective bargaining agreement with certain employers which contract is, on its face, violative of Section 8(e) of the Act. Respondent denies that it has violated that Act.

All parties[3] were given full opportunity to participate at the hearing, to introduce relevant evidence,[4] to examine and cross-examine witnesses, to argue orally,[5] and to file posthearing briefs.

On the entire record herein, including posthearing briefs from Respondent, the Charging Party, the Intervenors, and the General Counsel, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Federated Department Stores, Inc., d/b/a Ralphs Grocery Company, Albertson's Inc., Alpha Beta Company, Arden-Mayfair, Inc., The Boys Market, Inc., Food Co. Markets, Inc., Hughes Markets, Inc., Jurgensen's Grocery Company, The Kroger Company d/b/a Market Basket, Lucky Stores, Inc., Safeway Stores, Incorporated, Smith's Management Corporation, d/b/a Smith's Food King, Thriftimart Incorporated, and Vons Grocery Company, herein collectively called the Employers, are now, and have been at all times material herein, corporations duly organized under and existing by virtue of the laws of the State of California, with offices and principal places of businesses located throughout California, where they are engaged in the retail operation of supermarkets. The complaint alleges, the answer admits, and I find that the Employers were, at the time of the hearing and at all times material herein, employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Charging Party is and has been at all times material, a multiemployer association which admits into membership employers in the retail food market industry, and which exists, in part, for the purpose of negotiating, executing and administering collective-bargaining agreements. As will be discussed in detail, infra, the Charging Party on behalf of certain of its employer-members, including the Employers, entered into a series of collective-bargaining agreements herein referred to as the Retail Food, Bakery, Candy and General Merchandise Agreement or as the contract. I find that the employer-members of the Charging Party bound to the contract, including the Employers, have in the aggregate an annual gross dollar volume of business in excess of $500,000 and annually purchase and cause to be shipped into the State of California from locations outside of the State goods and services in excess of $50,000.[6]

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent and the Intervenors are and each of them is a labor organization within the meaning of Section 2(5) of the Act.

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[1] The names of Respondent and the Intervenors were changed at the hearing to conform to the recently amended name of the chartering International.

[2] Retail Clerks Union Locals 770, 899, and 1167 chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC withdrew as Intervenors at the commencement of the hearing.

[3] On June 13, 1979, the Regional Director granted various motions of the Intervenors to intervene in the instant case as "parties to the contract."

[4] Respondent and the Intervenors, while not conceding the facial illegality of the contract, sought to adduce evidence offered to demonstrate that the factual context of the drafting and enforcement of the contract would show the contract not illegal. The General Counsel, with the concurrance of the Charging Party, objected to the admission of any evidence concerning the contract's origins or application. The theory of the General Counsel was that the sole violation alleged was that the contract was violative on its face and that, therefore, no factual background or context evidence was relevant to the narrow matter at issue. I sustained the objections of the Charging Party and the General Counsel to the receipt of any evidence not relevant to the existance of, the date of effective entrance into or the language of the contract. Frustra probatur quod probatum non relevat.

Respondent and the Intervenors sought to protect their record by requesting a continuance for the purpose of preparing and offering a detailed, lengthy offer of proof concerning the specifics of their rejected evidence. While discussions and characterization of the evidence was allowed during lengthy argument on the issue, no continuance or detailed submission or offer of proof was allowed. In my view, if my ruling herein be error, a full record must be made on the substantial and detailed evidence of the contract's origins, application and factual context. Therefore, if there is error at this threshold a remand is necessary. No offer of proof however detailed—Respondent noted that it had contemplated a trial of 7 days—could be of sufficient clarity as to avoid a remand in the event reviewing authority finds the excluded evidence relevant.

[5] All parties elected to waive oral argument save Respondent who moved for a continuance to present and prepare its concluding argument. On my denial of the request for continuance, Respondent elected to file a brief only.

[6] These findings are based on the unchallenged and credited testimony of Patrick C. Murphy.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Chronology of the Contract*

While the terms of the contract are not in dispute, the parties litigated the date the most recent contract was entered into. Respondent contends that the date of its entry into the contract is more than 6 months before the filing of the charge in the instant case, i.e., before August 16, 1978, and that the instant case, therefore, falls within the limiting provisions of Section 10(b) of the Act. The relevant events are not in dispute.

The parties had each entered into the contract effective from 1975 to 1978 at different times preceeding the contract's July 30, 1978 expiration. On July 29, 1978, the Charging Party, Respondent, and each of the Intervenors entered into a memorandum of understanding and agreement noting that the contract's article I(A)(3) was in litigation and providing if the contract language was declared unlawful, that the illegal language would be renegotiated by the parties. On August 25, 1978, all parties entered into a written agreement modifying and extending the previous agreement to July 26, 1981. Although the agreement of August 25, 1978, adopted by its terms the above noted July 29, 1978 agreement, it also adopted the 1975–1978 contract language of article I(A)(3).

From the above facts, I find that the parties to the contract, including the Charging Party, Respondent, and each Intervenor, entered into the contract on August 25, 1978, a date within 6 months of the filing and service of the charge herein.

B. *The Language of Article I(A)(3)*

The contract reads, in part, at article I(A)(3):

> The Employer agrees that any employees performing bargaining unit work set forth in this Agreement, within its establishments, including employees of lessees, licensees, and concessionaires shall be members of a single overall unit, and the Employer will at all times exercise and retain full control of the terms and conditions of employment within its establishments of all such employees pursuant to this Agreement and shall not enter into or maintain and enforce any lease or other agreement inconsistent with the provisions hereof. The employer's obligiation with respect to operators of leased departments is limited to that set forth above, provided that the Employer shall furnish to the Union written evidence that the operator of the leased department has assumed such obligation. . . . The seniority of employees of leased departments shall be separate from the seniority of employees of the Employer and of employees of other leased departments.

IV. ANALYSIS AND CONCLUSION

I find that the instant case is controlled by the Board's decision in *Retail Clerks Local 324 (Ralph's Grocery)*, 235 NLRB 711 (1978). In that case, the 1975–1978 contract was in issue with the identical language in article I(A)(3) before the Board. The Board found that language to be invalid on its face and violative of Section 8(e) of the Act. Without duplicating the anaylsis there contained, I find that for the reasons stated in that decision and to the extent therein found, that clause I(A)(3) is invalid on its face. By entering into the contract Respondent and each of Intervenors violated Section 8(e) of the Act.

Respondent and the Intervenors argue at length that the *Local 324* case was wrongly decided and/or is in conflict with Supreme Court precedent and therefore should not be followed. Such arguments are more properly placed before the Board. I am bound to follow Board precedent and I find no indication that the Board has abandoned its position in *Local 324* or that recent decisions of the Supreme Court require a reversal by me without Board guidance.

On these foregoing findings of fact and the entire record, I make the following

CONCLUSIONS OF LAW

1. The Employers are, and each of them is, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent and the Intervenors are and each of them is a labor organization within the meaning of Section 2(5) of the Act.
3. By entering into, maintaining, enforcing, or giving effect to article I(A)(3) of the "Retail Food, Bakery, Candy, and General Merchandise Agreement," to the extent said article has been found unlawful herein, Respondent and each Intervenor violated Section 8(e) of the Act for the reasons set forth herein.
4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent and the Intervenors and each of them has engaged in unfair labor practices in violation of Section 8(e) of the Act, I shall order that Respondent and the Intervenors cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

Respondent Local 1442 and Intervenors Locals 137, 324, 905, 1222 and 1428, each Chartered by United Food and Commercial Workers International Union, AFL–CIO–CLC, and their officers, agents, and representatives, shall

1. Cease and desist from entering into, maintaining, enforcing, giving effect to article I(A)(3) of its current "Retail Food, Bakery, Candy, and General Merchandise Agreement," with the Food Employers Council, Inc.,

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and its member-employers, and with any other employers or employer associations who have become party to such agreement, to the extent said article is found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[8] Copies of the notice on forms provided by the Regional Director for Region 31, after being duly signed by an appropriate representative, shall be posted by Respondent and each Intervenor, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent and each Intervenor to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish said Regional Director with signed copies of the aforesaid notice for posting by Food Employers Council, Inc., and its member-employers, or such of the employers as may be willing, at all places where notices to their respective employees or members are customarily posted.

(c) Notify the Regional Director within 20 days from the date of this Order what steps the Respondent and each Intervenor has taken to comply.

IT IS FURTHER ORDERED that all motions inconsistent with the above are denied.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT enter into, maintain, enforce, or give efffect to article I(A)(3) of our current "Retail Food, Bakery, Candy, and General Merchandise Agreement," with the Food Employers Council, Inc., and its member-employers, and with any other employers or employer associations who have become party to such agreement, insofar as said artilce has been interpreted by the National Labor Relations Board as being violative of Section 8(e) of the National Labor Relations Act.

RETAIL CLERKS UNION LOCAL 1442 CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."